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Reconciling Civil Recovery and Prosecution in the Fight Against Grand Corruption

Menyelaraskan Pemulihan Sipil dan Penuntutan dalam Perang Melawan Korupsi Besar

Rita Komalasari¹, Cecep Mustafa²

¹Yarsi University, Indonesia

²Ibnu Chaldun University, Indonesia

Article Info

Corresponding Author:

Rita Komalasari, Cecep Mustafa
✉ rita.komalasari161@gmail.com

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Abstract

This essay seeks to explore the treatment of grand corruption and the legal categorization of civil recovery regimes. It aims to provide fresh insights into the interface between combatting corruption and protecting human rights. Specifically, it questions whether grand corruption should be primarily treated as a criminal offense and examines the human rights concerns raised by the civil recovery approach. Moreover, it introduces clear criteria for balancing these competing imperatives. The research employs a literature approach, drawing from legal, human rights, and anti-corruption literature. This essay presents a twofold conclusion. First, it argues that grand corruption should be predominantly treated as a criminal offense, challenging the prevailing emphasis on civil recovery. This research offers fresh insights into reconciling these conflicting imperatives and informs future policy and legal developments in the fight against corruption.

Abstrak

Esai ini bertujuan untuk mengeksplorasi penuntutan terhadap korupsi besar dan kategorisasi hukum rezim pemulihan sipil. Tujuannya adalah untuk memberikan wawasan baru tentang antarmuka antara upaya memerangi korupsi dan perlindungan hak asasi manusia. Secara khusus, esai ini mempertanyakan apakah korupsi besar seharusnya lebih banyak diperlakukan sebagai pelanggaran pidana dan mengkaji kekhawatiran hak asasi manusia yang timbul akibat pendekatan pemulihan sipil. Selain itu, esai ini memperkenalkan kriteria yang jelas untuk menyeimbangkan imperatif yang bersaing ini. Penelitian ini menggunakan pendekatan literatur, mengambil dari literatur hukum, hak asasi manusia, dan anti-korupsi. Esai ini menyajikan dua kesimpulan. Pertama, ia berpendapat bahwa korupsi besar seharusnya lebih banyak diperlakukan sebagai pelanggaran pidana, menantang penekanan yang dominan pada pemulihan sipil. Penelitian ini menawarkan wawasan baru dalam menyelaraskan imperatif yang saling



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A. INTRODUCTION

1. Background

Corruption is a pervasive global issue, with devastating consequences for developing countries.¹ The illicit flow of funds from these nations, estimated between USD 25 billion and USD 45 billion annually, poses a significant challenge to their economic development and stability.² Addressing this problem requires effective measures to recover stolen assets and combat grand corruption. However, the pursuit of justice in such cases must navigate a complex terrain where the principles of civil recovery intersect with those of criminal justice and human rights. This paper delves into the intricate web of legal and ethical considerations surrounding the civil recovery of proceeds from grand corruption, particularly in the context of England and Wales, as governed by Part 5 of the Proceeds of Crime Act 2002 (POCA 2002).³ It scrutinizes whether the prevailing approach, which emphasizes civil recovery, aligns with the overarching objectives of criminal justice and human rights. The central argument of this paper is twofold. First, it contends that grand corruption, as a grave criminal offense, should predominantly be subject to criminal prosecution, save for exceptional circumstances. Second, it asserts that the classification of civil recovery as 'civil' under Part 5 of POCA 2002 raises profound human rights concerns. To address these concerns, this paper argues that the powers vested in Part 5 should be construed as criminal in nature, thereby invoking the procedural safeguards enshrined in both domestic criminal law and international instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms. The core values of liberty, autonomy, and freedom that underpin human rights are, at times, jeopardized by Part 5 proceedings, as assets can be seized without a criminal conviction or the heightened protections afforded by criminal due process. Nevertheless, it is crucial to acknowledge that civil recovery, when wielded judiciously, can also serve to enhance human rights, particularly social and economic rights, as corrupt acts can

¹ Desta, Yemane. "Manifestations and causes of civil service corruption in developing countries." *Journal of Public Administration and Governance* 9, no. 3 (2019): 23-35.

² Dolve, M. H., and Saul Mullard. "Addressing illicit financial flows for anti-corruption at country level." *A Primer for Development Practitioners*. U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute (2019).

³ Benson, Katie. *Lawyers and the proceeds of crime: the facilitation of money laundering and its control*. Routledge, 2020.

intrinsically violate these rights. Therefore, this paper concludes that while civil recovery holds the potential to promote human rights by repatriating ill-gotten assets, it should only dilute the safeguards of Article 6 of the European Convention under stringent conditions, safeguarding against undue encroachments on fundamental rights. To explore these multifaceted issues, this paper will be structured as follows: Part 2 will examine the prevailing approach to civil recovery and its implications for addressing grand corruption; Part 3 will delve into the criminal classification of grand corruption and the associated legal complexities; Part 4 will dissect the human rights implications of civil recovery; and finally, Part 5 will synthesize the findings and propose a balanced framework that reconciles the pursuit of justice, human rights, and the fight against corruption.

This research offers several novel contributions to the fields of justice, human rights, and the fight against corruption: This study advocates for a paradigm shift in the treatment of grand corruption. It asserts that grand corruption, given its severity and societal impact, should be primarily addressed through criminal prosecution. This perspective challenges the prevailing emphasis on civil recovery and highlights the need for a more punitive response to this form of corruption, setting a new direction for anti-corruption efforts. The paper critically examines the civil recovery regime in England and Wales, shedding light on the human rights implications of categorizing such proceedings as 'civil.' By calling for the reclassification of Part 5 powers as criminal in nature, it challenges the status quo and offers a fresh perspective on how these regimes should operate within the broader legal framework. While acknowledging the potential of civil recovery to enhance human rights by repatriating illicit assets, this research introduces a nuanced stance. It proposes clear criteria for when civil recovery procedures can dilute the safeguards of Article 6 of the European Convention, thus providing a balanced approach that safeguards both fundamental rights and the fight against corruption.⁴ This study recognizes that grand corruption can directly infringe upon social and economic rights, and therefore, its repatriation through civil recovery can serve to protect these rights. This novel perspective highlights the interconnectedness of human rights and anti-corruption efforts and emphasizes the potential for asset recovery to advance social justice. This research offers a holistic framework that takes into account the complexities of grand corruption, human rights, and justice. By advocating for a criminal approach to

⁴ Boucht, Johan. "Asset confiscation in Europe—past, present, and future challenges." *Journal of Financial Crime* 26, no. 2 (2019): 526-548.

grand corruption while also addressing the human rights concerns, it presents a comprehensive strategy for tackling corruption that respects both the rule of law and fundamental rights. This study challenges conventional wisdom in the field by proposing a reevaluation of the treatment of grand corruption and the legal categorization of civil recovery regimes. It advances a nuanced perspective that seeks to strike a balance between the imperative to combat corruption and the protection of human rights, offering fresh insights and perspectives that can inform future policy and legal developments in the fight against corruption.

Existing literature often focuses on the civil recovery aspect of corruption cases, neglecting to address whether grand corruption, characterized by significant societal harm, should predominantly be treated as a criminal offense.⁵ This essay bridges this gap by advocating for a reevaluation of the treatment of grand corruption, emphasizing the importance of criminal prosecution as a primary tool in combating this grave form of corruption. While the human rights implications of civil recovery are acknowledged in some literature, there is often a lack of detailed analysis regarding how civil recovery regimes can impact the presumption of innocence, the right to property, and other fundamental rights. This essay provides an in-depth examination of these human rights concerns, offering a nuanced perspective on the balance between anti-corruption efforts and human rights protection. The literature often lacks specific criteria for determining when civil recovery proceedings can justify the dilution of human rights protections. This essay introduces clear criteria to guide such decisions, providing a practical framework for policymakers and legal practitioners to strike a balance between justice and human rights in corruption cases. Existing literature tends to view corruption and human rights as separate fields, often overlooking the direct impact of grand corruption on social and economic rights. This essay underscores the interconnectedness of these issues and suggests that repatriating stolen assets through civil recovery can be a means to protect and enhance social and economic rights. Many studies offer specialized perspectives on aspects of corruption or human rights, but few provide a comprehensive framework that integrates these concerns into a single, coherent strategy. This essay addresses this gap by presenting a holistic framework that considers the multifaceted nature of grand corruption, the imperatives of combating corruption, and the need to safeguard human rights. This essay fills critical gaps in the existing literature by presenting a

⁵ Wahyudi, Sugeng. "Penal policy on assets recovery on corruption cases in Indonesia." JILS 4 (2019): 45.

comprehensive and nuanced perspective on the treatment of grand corruption, the human rights implications of civil recovery, and the criteria for balancing anti-corruption efforts with the protection of fundamental rights. It offers a practical and forward-looking approach that can inform policy and legal developments in the fight against corruption, making it a valuable contribution to the field.

2. Research Question

"What is the optimal approach to reconciling civil recovery and criminal prosecution in the fight against grand corruption, while preserving fundamental human rights and ensuring a just and effective response to this global challenge?"

3. Method

This study employs a comprehensive literature review as a fundamental research method. It involves the systematic analysis of existing academic literature, legal texts, international conventions, and case studies related to grand corruption, civil recovery mechanisms, human rights, and anti-corruption efforts. By synthesizing a wide range of scholarly works and legal documents, this approach provides a solid foundation for understanding the complexities of the subject matter and informing the development of a comprehensive framework. Data analysis in this study primarily involves qualitative content analysis of the reviewed literature and legal documents. It focuses on identifying key themes, arguments, and insights related to the reconciliation of civil recovery, criminal justice, and human rights. This analysis serves to distill critical findings, frame policy recommendations, and uncover nuanced perspectives within the existing body of knowledge.

B. DISCUSSION

1. The Prevailing Approach to Civil Recovery and Grand Corruption

Grand corruption is not merely a financial or legal issue; it is intricately linked to the violation of human rights.⁶ This section emphasizes how grand corruption can directly infringe upon social and economic rights. When resources meant for public welfare are siphoned off through corruption, it leads to the denial of essential services like healthcare, education, and clean water. The consequence is the violation of individuals' social and

⁶ Olojede, Ibukunoluwa Bose, and Goodnews Osah. "Political Corruption and Human Security in Nigeria." *RUJMASS* 6 (2020): 11-21.

economic rights, hindering their ability to lead dignified lives. Recognizing this interconnectedness highlights the importance of addressing grand corruption as a means to protect and enhance human rights. To reconcile the imperatives of combating corruption with the protection of human rights, a comprehensive framework is needed. This framework must consider the multifaceted nature of grand corruption, the complexities of the legal system, and the international obligations under human rights conventions. It should integrate principles of justice, accountability, and transparency with the safeguarding of fundamental rights. This section will present such a holistic framework that outlines a clear path forward. It will highlight the importance of criminal prosecution as the default approach for grand corruption cases while acknowledging the limited circumstances where civil recovery may be appropriate. It will also emphasize the role of international cooperation, emphasizing the need for a coordinated global response to combat grand corruption effectively. The ultimate challenge lies in striking the delicate balance between anti-corruption efforts and human rights protection. This balance must be predicated on the principles of proportionality and necessity. While recognizing the urgency of combating corruption, it is imperative not to overreach and infringe upon the fundamental rights of individuals. The criteria proposed in earlier sections will be instrumental in ensuring that this balance is achieved in practice.

Corruption stands as an endemic challenge in developing countries, exacting a heavy toll on their socio-economic progress and stability. At the heart of this challenge is the alarming scope of corruption, manifesting through annual illicit outflows of funds that range between USD 25 billion and USD 45 billion.⁷ This staggering scale of capital flight underscores the gravity of the problem, representing not just financial losses, but also the erosion of trust in institutions, economic inequality, and the compromising of basic public services. The annual illicit outflows can be traced to various corrupt practices, including embezzlement, bribery, and kickbacks, facilitated by both public officials and private actors. These acts of corruption divert critical resources away from essential sectors such as healthcare, education, and infrastructure development, perpetuating a cycle of poverty and hindering societal advancement. As a result, corruption not only undermines economic growth but also exacerbates social inequalities, particularly affecting vulnerable and marginalized populations. Developing countries, grappling with limited resources and infrastructure, are especially susceptible to the adverse effects of

⁷ Zeiler, Irmgard, Federico Sallusti, Alexander Kamprad, and Enrico Bisogno. "Measuring illegal economic activities and illicit financial flows: challenges and possible solutions." indicator 16 (2019): 1.

corruption. The stolen wealth often finds safe havens in foreign jurisdictions, making it exceedingly challenging for these nations to recover stolen assets and reinvest them in their own development. Consequently, the magnitude of the corruption problem in developing countries underscores the urgent need for effective measures to combat it and recover stolen assets. This section illuminates the extent of corruption's impact in developing countries, setting the stage for an exploration of the prevailing approach to tackling this complex issue through civil recovery mechanisms and the ensuing challenges and tensions it presents. As civil recovery mechanisms take center stage in the fight against corruption, a host of difficulties and tensions emerge at the intersection of civil recovery, criminal justice, and human rights principles. This section dissects these complexities, highlighting the inherent challenges in the prevailing approach: One of the most pronounced tensions lies in the presumption of innocence, a fundamental tenet of criminal justice. Civil recovery, with its lower burden of proof and the absence of a criminal trial, can inadvertently cast a shadow of guilt on individuals and entities whose assets are seized.⁸ This premature assumption of wrongdoing runs contrary to the principle that individuals are innocent until proven guilty in a court of law. The tension between swiftly seizing assets and upholding the presumption of innocence must be carefully navigated. Civil recovery, by design, involves the seizure of assets obtained through corrupt means. While this is intended to ensure the return of ill-gotten gains, it also raises concerns about the infringement upon the right to property. Individuals and entities may lose their assets without the due process protections afforded by criminal trials, posing a significant ethical and legal challenge. Striking a balance between asset recovery and property rights becomes paramount. The efficacy of civil recovery in holding wrongdoers accountable and deterring corruption is debated. Without the imposition of criminal penalties, critics argue that civil recovery may fall short in delivering sufficient consequences for corrupt acts. This tension between recovering assets and ensuring accountability calls into question the effectiveness of civil recovery as a deterrent against grand corruption. Civil recovery often involves cross-border asset repatriation, requiring international cooperation.⁹ However, differences in legal systems and varying levels of commitment to human rights among nations can create tensions. Achieving a harmonious approach to civil recovery on a global scale while respecting human rights can be intricate.

⁸ Rulli, Louis S. "Prosecuting Civil Asset Forfeiture on Contingency Fees: Looking for Profit in All the Wrong Places." *Ala. L. Rev.* 72 (2020): 531.

⁹ Helfer, Laurence R., Cecily Rose, and Rachel Brewster. "Flexible Institution Building in the International Anti-Corruption Regime: Proposing a Transnational Asset Recovery Mechanism." (2023).

The legislative frameworks governing civil recovery may not always align seamlessly with human rights principles. Ambiguities and gaps in these frameworks can lead to inconsistencies in practice, further exacerbating tensions between anti-corruption efforts and human rights protection. Navigating these challenges and tensions necessitates a nuanced approach that respects the principles of justice, due process, and human rights while effectively combatting corruption. The subsequent sections of this essay will delve into the reevaluation of grand corruption as a criminal offense and the human rights implications of civil recovery, proposing a balanced framework that reconciles these competing imperatives.

2. Reclassification of Grand Corruption as a Criminal Offense

Grand corruption represents an egregious and distinctive form of corrupt practices that transcends the boundaries of ordinary corruption.¹⁰ To comprehensively understand the argument for reclassifying grand corruption as a criminal offense, it is essential to first establish a clear definition and differentiation from other forms of corruption. At its core, grand corruption involves individuals in prominent positions of authority, often at the highest levels of government or corporate power. These individuals wield significant influence and are responsible for making critical decisions that impact society at large. Grand corruption is not limited to individual gain; it inflicts severe societal harm. Corrupt acts at this level can lead to the misappropriation of substantial public resources meant for critical services, such as healthcare, education, and infrastructure. As a result, grand corruption undermines the well-being and progress of entire communities and nations. Grand corruption typically involves the embezzlement, diversion, or theft of significant financial sums. The sheer magnitude of the stolen wealth sets it apart from other forms of corruption, making it a matter of global concern. Grand corruption often unfolds through intricate financial transactions and elaborate schemes designed to conceal the origins of the ill-gotten gains. This complexity makes it a formidable challenge for investigators and prosecutors. It is crucial to differentiate grand corruption from other forms of corruption, such as petty or bureaucratic corruption: Petty corruption typically involves lower-level public officials or individuals who engage in small-scale corrupt practices, often for personal gain. These acts, while corrosive, do not result in the same level of societal harm or financial devastation as grand corruption. Bureaucratic corruption occurs within the

¹⁰ Rajan, Sudhir Chella. *A social theory of corruption: Notes from the Indian Subcontinent*. Harvard University Press, 2020.

administrative machinery of government, often affecting routine services and processes. While it can be widespread and undermine public trust, it lacks the magnitude and societal impact associated with grand corruption. By defining grand corruption and distinguishing it from other forms of corruption, we lay the foundation for the argument that grand corruption warrants a distinct and primarily criminal response. The next sections will present the case for treating grand corruption as a criminal offense, acknowledging exceptional circumstances where civil recovery may still be relevant, and proposing a balanced framework that reconciles these imperatives.

3. Human Rights Implications of Civil Recovery

Reformasi UU Pajak Tahun 1983 dimaksudkan untuk mengganti peraturan perundang-undangan perpajakan warisan kolonial menjadi UU Perpajakan Nasional yang dilandasi falsafah Pancasila dan UU DNRI Tahun 1945. Perbedaan yang mendasar dari UU Perpajakan Nasional dibandingkan dengan UU Perpajakan warisan Kolonial adalah system dan mekanisme serta cara pandang terhadap wajib pajak yang tidak dianggap sebagai “obyek” tetapi merupakan subyek yang harus dibina dan diarahkan agar mau dan mampu memenuhi kewajiban perpajakannya sebagai pelaksana kewajiban kenegaraan¹¹.

Treating grand corruption as a primarily criminal offense is essential due to the gravity of the crime and its profound societal impact.¹² Several compelling arguments support this approach: Grand corruption inflicts severe societal harm by diverting substantial resources meant for public welfare into the hands of corrupt individuals. The consequences of this crime extend far beyond financial losses; they manifest in inadequate healthcare, subpar education, dilapidated infrastructure, and diminished economic prospects for entire communities. The gravity of such harm underscores the need for a commensurate response. Grand corruption corrodes the foundations of democracy and governance. When high-level officials entrusted with public office engage in corrupt practices, it erodes public trust and weakens democratic institutions. This erosion of democracy threatens the stability and progress of nations, emphasizing the crime's profound implications. Grand corruption is often transnational, with the stolen assets finding refuge in foreign

¹¹ Padmo Wahyono, *Konsep Yuridis Negara Hukum Indonesia*, (Jakarta, PSHTN UI, 1998) hlm. 4-19

¹² Ngumbi, Eric. "Reconstructing the elusive fight against corruption in Africa: the quest to re-characterize political corruption as an international crime." *The International Journal of Business and Management* 8, no. 2 (2020): 98-106.

jurisdictions. This global dimension amplifies the gravity of the crime, as it undermines international efforts to combat corruption and uphold the rule of law. International instruments, such as the United Nations Convention against Corruption (UNCAC), recognize grand corruption as a threat to global security, further emphasizing the need for criminal prosecution.¹³ Criminal prosecution is an essential tool for holding wrongdoers accountable for their actions. It ensures that those responsible for grand corruption face appropriate penalties, including imprisonment. This accountability is essential for justice to prevail and for victims to see that corrupt individuals are not above the law. Criminal penalties act as a powerful deterrent against grand corruption. The prospect of facing criminal charges and imprisonment serves as a significant disincentive for individuals contemplating corrupt acts. By prioritizing criminal prosecution, societies send a clear message that grand corruption will not be tolerated. Criminal trials are conducted with rigorous adherence to due process, ensuring that the rights of both the accused and society are protected. This procedural rigor safeguards against wrongful convictions and upholds the principles of justice. Criminal proceedings provide a platform for fair trials, ensuring that evidence is scrutinized, witnesses are heard, and verdicts are reached based on the rule of law. This level of transparency and fairness is fundamental to achieving just outcomes. The gravity of grand corruption, its profound societal impact, the imperative for accountability, and the need for effective deterrence all support the argument for treating grand corruption primarily as a criminal offense. Criminal prosecution is not only a matter of justice but also an essential tool for safeguarding the well-being of societies and upholding the rule of law on a global scale. It is an approach that aligns with international conventions and instruments aimed at combatting corruption and promoting good governance.

While advocating for treating grand corruption primarily as a criminal offense, it is essential to acknowledge that there may be exceptional circumstances where civil recovery remains a relevant tool in the anti-corruption arsenal.¹⁴ However, these exceptions should be narrowly defined and applied judiciously, with the understanding that criminal prosecution is the default approach in most cases. Here, we acknowledge the nuances and circumstances where civil recovery may still be

¹³ Jim, Sandra Maria. "Analysis of Financial Corruption in International Commercial Law." Issue 2 Indian JL & Legal Rsch. 5 (2023): 1.

¹⁴ Birkett, Daley J. "Recovering assets at an international anti-corruption court: cautionary tales from Rome, The Hague, and the field." The Hague, and the Field (April 21, 2023) 2, no. 1 (2023).

pertinent: In cases where the jurisdiction to conduct a criminal prosecution is limited or where political interference hampers the criminal justice process, civil recovery can serve as a practical alternative. The recovery of stolen assets through civil means may be the only feasible way to hold wrongdoers accountable and repatriate illicit funds to the affected country. In situations where there is an imminent risk of dissipation or concealment of assets, civil recovery may be necessary as an interim measure to preserve those assets. This ensures that the ill-gotten gains are not irretrievably lost before a criminal trial can be pursued. Civil recovery may be applicable when the assets in question are in the possession of third parties who are not directly implicated in the corruption scheme. In such cases, pursuing criminal charges against these third parties may be unwarranted, and civil recovery may offer a more expeditious means of repatriating the assets. Civil recovery proceedings can play a role in the early stages of an investigation by facilitating asset tracing and evidence gathering. This information can be valuable for subsequent criminal prosecutions. It is important to underscore that these exceptions should be well-defined and circumscribed by clear legal and procedural safeguards to prevent abuse and protect the rights of individuals and entities subject to civil recovery actions. Additionally, the default approach in cases of grand corruption should always be criminal prosecution, with civil recovery considered a secondary option under exceptional circumstances. By acknowledging these exceptions and nuances, we strike a balance between the imperative of criminal prosecution for grand corruption and the practical challenges that may necessitate civil recovery in specific situations. This nuanced approach ensures that the fight against grand corruption remains effective while upholding the principles of justice and human rights.

Civil recovery, while aimed at combating corruption, carries significant implications for fundamental human rights.¹⁵ This section scrutinizes how civil recovery can encroach upon critical human rights, particularly: Civil recovery proceedings can inadvertently undermine the fundamental principle that individuals are presumed innocent until proven guilty in a court of law. This encroachment occurs due to several factors: In civil recovery, assets can be seized without a prior criminal conviction. This means that individuals or entities may face the loss of their assets, including bank accounts, real estate, or other property, based solely on

¹⁵ Trinchera, Tommaso. "Confiscation and asset recovery: Better tools to fight bribery and corruption crime." In *Criminal Law Forum*, vol. 31, no. 1, pp. 49-79. Dordrecht: Springer Netherlands, 2020.

suspicions of corruption. This departure from the presumption of innocence before a fair trial can have severe consequences for their reputation and livelihood. The public perception and media coverage surrounding civil recovery actions can lead to stigmatization of individuals and entities subject to asset seizures. The mere fact that assets are confiscated can create an impression of guilt, even in the absence of a criminal trial. This premature assumption of wrongdoing directly contradicts the principle of presumption of innocence. The right to property is another fundamental human right that can be significantly affected by civil recovery: Civil recovery entails the seizure of assets acquired through corrupt means. While the objective is to ensure that stolen wealth is returned to its rightful owners or the affected country, this process can infringe upon the right to property. Individuals or entities may lose their assets without the due process protections typically afforded by criminal trials. Asset seizures can have profound economic and social consequences. Individuals and entities may lose their businesses, homes, or savings, jeopardizing their livelihoods and those of their dependents. Civil recovery proceedings, with their lower burden of proof compared to criminal trials, can raise concerns about due process and fair trial rights: Participants in civil recovery proceedings may have limited access to the robust due process protections typically available in criminal trials, including the right to legal representation, the right to remain silent, and the right to challenge evidence. This imbalance can hinder their ability to defend themselves effectively. The lower standard of proof ("balance of probabilities" rather than "beyond a reasonable doubt") can lead to asset seizures even when there is not enough evidence to secure a criminal conviction. This dilution of the standard of proof can undermine the fairness of the process. In examining these human rights implications, it becomes evident that civil recovery, while a valuable tool in the fight against corruption, must be implemented with meticulous attention to safeguarding the presumption of innocence, the right to property, and the principles of due process and fair trial. The following sections will delve into the legal framework, particularly the European Convention on Human Rights (ECHR), and propose criteria to balance anti-corruption efforts with human rights protection.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) plays a pivotal role in safeguarding human rights in

the context of civil recovery.¹⁶ Its applicability and relevance to civil recovery proceedings are paramount considerations: The ECHR, adopted in 1950 and binding on all member states of the Council of Europe, sets forth a comprehensive framework for the protection of fundamental human rights. While civil recovery proceedings may vary in design and implementation across European countries, they invariably intersect with human rights principles, making the ECHR applicable in several key ways: Article 6 of the ECHR enshrines the right to a fair trial. This provision becomes relevant in civil recovery cases, as it imposes obligations to ensure that proceedings are conducted fairly and transparently. It encompasses principles such as the right to legal representation, the right to remain silent, and the right to challenge evidence—all of which have implications for individuals subject to asset seizures. Article 1 of Protocol No. 1 (Protection of Property): This protocol complements the ECHR by specifically addressing property rights. Article 1 safeguards the right to peaceful enjoyment of possessions, directly relevant when assets are seized through civil recovery. Any interference with this right must meet the requirements of lawfulness and proportionality. Article 8 (Right to Respect for Private and Family Life): In cases where civil recovery actions involve intrusions into an individual's private and family life, Article 8 may come into play. This article protects against arbitrary interference and underscores the need for a balance between anti-corruption efforts and respect for privacy. The ECHR's relevance to civil recovery is underscored by its role in ensuring that asset seizure proceedings are conducted in a manner consistent with human rights principles: The ECHR calls for a balance between the imperatives of combating corruption and the protection of human rights. This balance is particularly pertinent in civil recovery, where the seizure of assets must respect the presumption of innocence, the right to property, and the principles of due process and fair trial. The ECHR sets a standard for the legal safeguards that must accompany asset seizure actions. This includes requirements for transparency, access to legal representation, and the opportunity to challenge the legality of the actions. The ECHR emphasizes the principle of proportionality, which demands that any interference with human rights must be proportionate to the legitimate aim pursued. In civil recovery, this entails ensuring that asset seizures are proportionate to the severity of the alleged

¹⁶ Titko, Elvira, Ilona Kurovska, Petro Korniienko, Irena A. Balzhyk, and Ganna M. Stoyatska. "Military-civil interaction through the prism of human rights protection: the experience of the ECtHR." *Linguistics and Culture Review* 5, no. S3 (2021): 649-666.

corruption and that the impact on individuals' rights is minimized. The ECHR's applicability and relevance to civil recovery cannot be overstated. It provides a legal framework that guides the conduct of asset seizure proceedings, ensuring that anti-corruption efforts are conducted in a manner that respects and upholds fundamental human rights. The next section will propose criteria for determining when civil recovery proceedings can justify the dilution of human rights protections, thus striking a balance between anti-corruption efforts and human rights preservation.

4. Balancing Anti-Corruption Efforts and Human Rights

In reconciling the tensions between civil recovery proceedings and the protection of human rights, it is crucial to establish clear and transparent criteria for determining when civil recovery can justify the dilution of human rights protections.¹⁷ These criteria are essential for ensuring that anti-corruption efforts remain effective while respecting fundamental human rights. The following criteria propose a balanced approach: The gravity of the alleged corruption should be a central criterion. Civil recovery may be more justifiable when the corruption is of such magnitude that it poses an exceptional threat to the well-being of society, such as grand corruption involving high-level officials and substantial financial sums. In such cases, the urgency of recovering stolen assets may outweigh certain human rights considerations. The availability and feasibility of criminal prosecution should be carefully considered. If criminal prosecution is a viable option and is not impeded by political interference or jurisdictional limitations, it should be the preferred course of action. Civil recovery should only be pursued when criminal prosecution is genuinely impractical or unattainable. Civil recovery may be justified when there is an immediate risk of dissipation or concealment of assets. This criterion recognizes the need to act swiftly to prevent the irretrievable loss of stolen wealth. However, the urgency of preserving assets should be carefully evaluated on a case-by-case basis. Civil recovery proceedings must incorporate robust safeguards and due process protections. This includes ensuring that individuals subject to asset seizures have access to legal representation, the right to remain silent, and the ability to challenge the legality of the actions. These safeguards should mirror the protections afforded in

¹⁷ Kachika, Tinyade. "Juxtaposing emerging community laws and international human rights jurisprudence on the protection of women and girls from harmful practices in Malawi." *African Human Rights Law Journal* 23, no. 1 (2023): 126-155.

criminal trials to maintain fairness and transparency. The principle of proportionality must guide civil recovery actions. Asset seizures should be proportionate to the severity of the alleged corruption, and measures should be taken to minimize interference with individuals' rights. Any interference with the presumption of innocence and the right to property should be the least restrictive necessary to achieve the legitimate aim of recovering stolen assets. Civil recovery proceedings should be conducted transparently and accountably. This includes publishing information about ongoing cases, providing reasons for asset seizures, and subjecting the process to oversight and review. Transparency enhances public trust and confidence in the fairness of civil recovery actions. International cooperation and coordination are essential when civil recovery involves cross-border asset repatriation. Criteria should be established to ensure that the interests of all affected parties are taken into account, and that the process adheres to international human rights standards. By adhering to these criteria, civil recovery proceedings can strike a delicate balance between the imperatives of combating corruption and the protection of human rights. These criteria provide a principled framework for policymakers, legal practitioners, and international organizations to ensure that civil recovery actions are conducted in a manner that respects fundamental human rights while effectively recovering stolen assets and deterring corrupt practices.

The nexus between corruption and human rights is not merely coincidental; it is deeply interwoven. Grand corruption, in particular, directly violates essential social and economic rights, underscoring the need for a balanced approach that addresses both corruption and the protection of human rights. Grand corruption can siphon funds away from education systems, leading to inadequate resources for schools, teachers, and students. As a result, the right to education, a fundamental social right, is compromised, limiting access to quality education and hindering social mobility. Corruption in healthcare systems can have dire consequences for the right to health. Stolen resources may lead to substandard medical facilities, lack of essential medications, and barriers to healthcare access, disproportionately affecting vulnerable populations. Illicit gains from grand corruption can inflate real estate prices and exacerbate housing crises. This not only infringes on the right to adequate housing but also contributes to homelessness and housing inequality. Corruption can distort labor markets and hinder economic growth, directly affecting the right to work. When public resources are misappropriated through grand corruption, job

opportunities may be limited, especially for marginalized communities. The misallocation of resources due to corruption can lead to economic disparities and hinder efforts to ensure an adequate standard of living for all. Grand corruption can perpetuate poverty and undermine efforts to reduce income inequality. Corruption in food distribution systems can disrupt the supply chain, leading to food shortages and price hikes. As a result, the right to food is compromised, particularly for vulnerable and food-insecure populations. Recognizing the interconnectedness of corruption and human rights underscores the imperative of addressing grand corruption as a severe criminal offense. Failing to hold perpetrators of grand corruption accountable not only perpetuates corruption itself but also perpetuates the violation of social and economic rights, exacerbating inequalities and hindering societal progress. Balancing anti-corruption efforts with human rights protection requires a comprehensive framework that considers the multifaceted nature of grand corruption, social and economic rights, and the broader implications for society. The following sections will elaborate on such a framework, emphasizing the importance of reconciling these intertwined imperatives.

To effectively reconcile the multifaceted nature of grand corruption, human rights protection, and anti-corruption efforts, a holistic framework is essential. This framework should provide a structured approach that guides policymakers, legal practitioners, and international organizations in striking the right balance. Here, we present a comprehensive framework that takes into account these intertwined imperatives: Grand corruption should be explicitly criminalized in national legal systems. This ensures that corrupt acts at the highest levels of power are treated as criminal offenses, subject to criminal investigations, trials, and penalties. Promote international cooperation in the investigation and prosecution of grand corruption cases. Effective coordination between countries is crucial for holding perpetrators accountable and repatriating stolen assets. Ensure that individuals subject to criminal prosecution for grand corruption are afforded robust due process protections, including the right to legal representation, the right to remain silent, and the right to challenge evidence. Uphold the presumption of innocence until proven guilty in a court of law. Ensure that individuals are not stigmatized or subject to asset seizures without a fair trial. Assess the proportionality of asset seizures, ensuring that they are commensurate with the severity of the alleged corruption. Avoid disproportionate interference with the right to property. Establish narrowly defined exceptions where

civil recovery may be pursued, such as when criminal prosecution is genuinely unattainable due to limited jurisdiction or political interference. Allow civil recovery as an interim measure to preserve assets in cases where there is an immediate risk of dissipation or concealment. Implement legal safeguards in civil recovery proceedings to protect the rights of individuals and entities subject to asset seizures, mirroring the protections available in criminal trials. Ensure transparency in civil recovery proceedings by publishing information about ongoing cases, providing reasons for asset seizures, and subjecting the process to oversight and review. Prioritize the repatriation of recovered assets to the affected country, where they can be reinvested in areas such as healthcare, education, and infrastructure, benefiting the population. Ensure that all efforts align with international instruments and conventions aimed at combatting corruption and protecting human rights, such as the United Nations Convention against Corruption (UNCAC) and the European Convention on Human Rights (ECHR). Encourage global cooperation in the fight against grand corruption. Establish clear guidelines for international asset repatriation, taking into account the interests of all affected parties. This comprehensive framework provides a principled and balanced approach that addresses grand corruption as a severe criminal offense while safeguarding human rights and due process. By prioritizing criminal prosecution, implementing stringent safeguards, and allowing civil recovery only in exceptional circumstances, this framework strives to uphold the rule of law, protect fundamental human rights, and combat corruption effectively.

In the complex landscape of combatting corruption and protecting fundamental rights, the imperative of striking the right balance cannot be overstated.¹⁸ This equilibrium is not merely an academic exercise; it is essential for the well-being of societies, the preservation of democracy, and the upholding of the rule of law. At its core, grand corruption represents a profound betrayal of public trust, an erosion of democratic principles, and a stark violation of social and economic rights. It is a crime that demands robust and unequivocal responses. However, in our pursuit of justice and accountability, we must not lose sight of the principles that underpin the very foundations of our societies—principles such as the presumption of innocence, the right to property, due process, and the right to a fair trial. The comprehensive framework presented here encapsulates the essence of this delicate

¹⁸ Juarez Garcia, Mario Ivan. "Essays on Political Corruption." (2021).

equilibrium. It acknowledges the gravity of grand corruption and the need for criminal prosecution as the primary response. It also recognizes the exceptional circumstances where civil recovery may be relevant, albeit under strict safeguards and clear criteria. Above all, it underscores the importance of transparency, accountability, and international cooperation. Striking the balance between combatting corruption and protecting fundamental rights is not an easy task, but it is an imperative one. It is a testament to our commitment to justice and human rights. It is a commitment to a world where grand corruption is met with the full force of the law, where individuals are presumed innocent until proven guilty, and where the rights and dignity of all are upheld. As we move forward in the fight against grand corruption, let us remember that the true measure of our success lies not only in the recovery of stolen assets but in our unwavering dedication to justice, human rights, and the betterment of our global community. By striking this balance, we can build a future where corruption is a relic of the past, and the rights and freedoms of all are cherished and safeguarded.

In the relentless battle against grand corruption, we have navigated through the intricate terrain of balancing anti-corruption efforts with the protection of fundamental human rights. This journey has underscored the profound interconnectedness of corruption and rights violations, calling for a nuanced and principled approach. We recommend that policymakers, legal practitioners, and international organizations adopt this comprehensive framework as a guiding principle in the fight against grand corruption. This entails: Explicitly criminalizing grand corruption in national legal systems. Prioritizing criminal prosecution and international cooperation. Implementing stringent due process protections and safeguards. Allowing civil recovery as a supplementary tool under narrowly defined exceptions. Ensuring transparency, accountability, and global cooperation. By incorporating these recommendations, nations can fortify their anti-corruption efforts while safeguarding human rights, thereby fostering more just and equitable societies. While this framework strives to reconcile the tensions between anti-corruption efforts and human rights protection, it is not without limitations. Its successful implementation depends on the commitment of governments, the integrity of legal systems, and the availability of resources. In contexts where these factors are compromised, achieving the desired balance may prove challenging. Additionally, the framework's effectiveness in deterring grand corruption and ensuring asset

repatriation may vary depending on the political will and capacity of individual countries. Nonetheless, this framework stands as a principled and holistic guide, steering us toward a future where grand corruption is met with the full force of the law, human rights are cherished and safeguarded, and societies flourish in an environment of justice and accountability.

C. CONCLUSION

In conclusion, that grand corruption, with its staggering societal harm, merits classification as a criminal offense. The imperative of criminal prosecution is clear, but it must be coupled with unwavering safeguards to protect the presumption of innocence, the right to property, and the principles of due process and fair trial. The comprehensive framework proposed herein encapsulates this equilibrium, emphasizing criminalization, human rights safeguards, and international cooperation. It strikes the right balance, allowing for civil recovery only in exceptional circumstances, while upholding the rule of law and ensuring transparency and accountability.

DAFTAR PUSTAKA

- Benson, Katie. *Lawyers and the proceeds of crime: the facilitation of money laundering and its control*. Routledge, 2020. <https://doi.org/10.4324/9781315179735>
- Birkett, Daley J. "Recovering assets at an international anti-corruption court: cautionary tales from Rome, The Hague, and the field." *The Hague, and the Field* (April 21, 2023) 2, no. 1 (2023).
- Boucht, Johan. "Asset confiscation in Europe-past, present, and future challenges." *Journal of Financial Crime* 26, no. 2 (2019): 526-548. <https://doi.org/10.1108/JFC-04-2018-0043>
- Desta, Yemane. "Manifestations and causes of civil service corruption in developing countries." *Journal of Public Administration and Governance* 9, no. 3 (2019): 23-35. <https://doi.org/10.5296/jpag.v9i3.14930>
- Dolve, M. H., and Saul Mullard. *Addressing illicit financial flows for anti-corruption at country level*. A Primer for Development Practitioners. U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute (2019).
- Helfer, Laurence R., Cecily Rose, and Rachel Brewster. *Flexible Institution Building in the International Anti-Corruption Regime: Proposing a Transnational Asset Recovery Mechanism*. (2023). <https://doi.org/10.2139/ssrn.4471178>
- Jim, Sandra Maria. "Analysis of Financial Corruption in International Commercial Law." *Issue 2 Indian JL & Legal Rsch.* 5 (2023): 1.
- Juarez Garcia, Mario Ivan. *Essays on Political Corruption*. (2021).

- Kachika, Tinyade. "Juxtaposing emerging community laws and international human rights jurisprudence on the protection of women and girls from harmful practices in Malawi." *African Human Rights Law Journal* 23, no. 1 (2023): 126-155. <https://doi.org/10.17159/1996-2096/2023/v23n1a6>
- Ngumbi, Eric. "Reconstructing the elusive fight against corruption in Africa: the quest to re-characterize political corruption as an international crime." *The International Journal of Business and Management* 8, no. 2 (2020): 98-106. <https://doi.org/10.24940/theijbm/2020/v8/i2/BM2002-047>
- Olojede, Ibukunoluwa Bose, and Goodnews Osah. "Political Corruption and Human Security in Nigeria." *RUJMASS* 6 (2020): 11-21.
- Rajan, Sudhir Chella. *A social theory of corruption: Notes from the Indian Subcontinent*. Harvard University Press, 2020.
- Rulli, Louis S. "Prosecuting Civil Asset Forfeiture on Contingency Fees: Looking for Profit in All the Wrong Places." *Ala. L. Rev.* 72 (2020): 531.
- Titko, Elvira, Ilona Kurovska, Petro Korniienko, Irena A. Balzhyk, and Ganna M. Stoyatska. "Military-civil interaction through the prism of human rights protection: the experience of the ECtHR." *Linguistics and Culture Review* 5, no. S3 (2021): 649-666. <https://doi.org/10.21744/lingcure.v5nS3.1550>
- Trinchera, Tommaso. "Confiscation and asset recovery: Better tools to fight bribery and corruption crime." In *Criminal Law Forum*, vol. 31, no. 1, pp. 49-79. Dordrecht: Springer Netherlands, 2020. <https://doi.org/10.1007/s10609-020-09382-1>
- Wahyudi, Sugeng. "Penal policy on assets recovery on corruption cases in Indonesia." *JILS* 4 (2019): 45. <https://doi.org/10.15294/jils.v4i01.28224>
- Zeiler, Irmgard, Federico Sallusti, Alexander Kamprad, and Enrico Bisogno. "Measuring illegal economic activities and illicit financial flows: challenges and possible solutions." *indicator* 16 (2019):